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FILED
04/20/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
43B-0906-R-2022
Lambert, Kathryn
3.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANT: Sara Katherine Howe Revocable Trust

CASE 43B-0906-R-2022
43B 194390-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Claim 43B 194390-00 appeared in the Preliminary Decree with a decree exceeded issue remark which is erroneous and with a place of use/ownership overlap issue remark which the Court will not pursue. The remarks will be removed.

This claim appeared in the Preliminary Decree with the following issue remark:

THE CLAIMED VOLUME EXCEEDS THE MAXIMUM FEASIBLE VOLUME. BASED ON THE FLOW RATE AND PERIOD OF USE, THE MAXIMUM VOLUME POSSIBLE IS 28.46 ACRE-FEET PER YEAR.

In addition, the abstract of this claim states that the ditch name is Upland Ditch but the point of diversion legal description is for Mill Creek Flat Ditch. The volume issue remark was not addressed through the objection process. The Water Court is required to resolve the issues raised by each issue remark. Section 85-2-248, MCA. Under Section 85-2-248(3), MCA, information in the claim file or other information obtained by the Court can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark and the Court can provide the claimant an opportunity to file additional information or evidence.

On December 14, 2022 the Order Consolidating Case And Setting Scheduling Conference was issued setting a January 18, 2023 scheduling conference to discuss the issues with the claimant. The claimant did not appear.

The January 27, 2023 Court Minutes, Order Entering Default, and Order Setting Deadline For Claimant To Show Cause Why Claim Should Not Be Amended Pursuant To 85-2-248(9)(a), MCA states:

As Sara Katherine Howe Revocable Trust did not appear as directed in the December 14, 2022 Order Consolidating Case And Setting Scheduling Conference, pursuant to Rule 55(a), M.R.Civ.P. and Rule 22, W.R.Adj.R., it is ORDERED that the default of Sara Katherine Howe Revocable Trust is ENTERED.

Under Section 85-2-248(9)(a), MCA, when a claimant fails to comply with an Order issued by the Water Court concerning resolution of issue remarks, the Court can amend the claim to conform it to information in the claim file such as the examination information which resulted in the addition of the issue remarks to the abstract of the claim.

The Preliminary Decree states that the volume for this claim is 37.67 acre feet. This claim appeared in the Preliminary Decree with the following issue remark:

THE CLAIMED VOLUME EXCEEDS THE MAXIMUM FEASIBLE VOLUME. BASED ON THE FLOW RATE AND PERIOD OF USE, THE MAXIMUM VOLUME POSSIBLE IS 28.46 ACRE-FEET PER YEAR.

The information in the claim file indicates that the volume should be 28.46 acre feet.

The Preliminary Decree states that the point of diversion is the NESWNE section 3, T6S, R9E, PARK and the ditch name is UPLAND DITCH. The Statement of Claim states that the point of diversion is the NENENW section 3, T6S, R9E, PARK and the ditch name is UPLAND DITCH. The information in the claim file indicates that the point of diversion legal description should be changed to NENENW section 3, T6S, R9E, PARK. Therefore, pursuant to section 85-2-

248(9)(a), MCA, it is

ORDERED that the deadline is **February 27, 2023** for Sara Katherine Howe Revocable Trust to show cause in writing why the Court should not proceed with amending the volume and point of diversion legal description as described above. If no additional information is filed by the deadline, the Court will proceed with amending the claim as detailed above.

Nothing was filed. These documents are viewable in the Court's FullCourt Enterprise case management system.

APPLICABLE LAW

"All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section." Section 85-2-248(2), MCA.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. The Preliminary Decree states that the volume is 37.67 AC-FT. The volume should be 28.46 AC-FT. The volume issue remark should be removed as addressed and resolved.

2. The Preliminary Decree states that the point of diversion legal description is NESWNE section 3, T6S, R9E, PARK. The point of diversion legal description should be NENENW section 3, T6S, R9E, PARK.

3. The Preliminary Decree includes the following remark:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT WERE FILED BY DIFFERENT PARTIES WHO CLAIM OVERLAPPING PLACES OF USE. 43B 37051-05, 43B 194192-00, 43B 194193-00, 43B 194194-00, 43B 194337-00, 43B 194338-00, 43B 194339-00, 43B 194340-00, 43B 194341-00, 43B 194342-00, 43B 194388-00, 43B 194390-00, 43B 194391-00.

This remark provides notice of a possible issue. No one objected to pursue this possible issue.

The remark should be removed as having served its notice purpose.

4. The Preliminary Decree also includes the following notice remark:

POINT OF DIVERSION WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE

ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

The remark should be removed as having served its notice purpose.

CONCLUSION OF LAW

The Statement of Claim is sufficient to resolve the point of diversion legal description issue, and to resolve the decree exceeded and volume issue remarks without evidentiary hearing. Sections 85-2-248(3) and (9), MCA.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service via USPS Mail:

Sara Katherine Howe Revocable Trust
73 Chicory Rd
Livingston, MT 59047

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 194390-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: HOWE SARA KATHERINE REVOCABLE TRUST
73 CHICORY RD
LIVINGSTON, MT 59047 8704

Priority Date: JUNE 4, 1963

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

***Flow Rate:** 70.00 GPM
THE FLOW RATE IS EQUIVALENT TO 0.156 CFS.

Volume: 28.46 AC-FT

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 10.00

Source Name: MILL CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENENW	3	6S	9E	PARK

Period of Diversion: APRIL 15 TO JULY 15

Diversion Means: HEADGATE

Ditch Name: UPLAND DITCH

Period of Use: APRIL 15 TO JULY 15

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	10.00		SENWNW	18	5S	9E	PARK
Total:	10.00						

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

194388-00 194390-00 194391-00

AUTHORIZATION TO CHANGE ISSUED 02/24/1989 FOR CHANGE IN POINT OF DIVERSION COMPLETED 11/08/1991. FILE REFLECTS RIGHT AS IT EXISTED PRIOR TO JULY 1973. APPROVED CHANGES WILL BE RECORDED AFTER FINAL DECREE. SEE 43B 194388-00.